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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 173

GULF REFINING COMPANY,
Petitioner,

versus

BLACK WARRIOR TOWING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the United States:

Gulf Refining Company (hereinafter referred to simply as Gulf) prays that a writ of certiorari issue out of this Court to review the judgment of the Court of Appeals for the Fifth Circuit dated February 20th, 1956, wherein a rehearing was denied on April 6th, 1956.

I.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is printed in full in the record, p. 841, and is reported in 127 F. Supp. 469, 1955 AMC 197. The opinion of the Circuit Court of

Appeals printed in Appendix A hereto, *infra* p. 23, is reported in 230 F. 2d 346.

II.

JURISDICTION

This is a proceeding in Admiralty under Article III, Sec. 2 of the Constitution of the United States originally filed in the United States District Court for the Eastern District of Louisiana.

The opinion of the Court of Appeal was entered on February 20th, 1956, and Gulf's petition for a rehearing was denied on April 6th, 1956.

The jurisdiction of this Court to review this case on certiorari is invoked under 28 U.S. Code, Sec. 1254(1).

III.

THE QUESTIONS PRESENTED FOR REVIEW

This petition presents only questions of law on four grounds, namely:

(1) The Court of Appeal denied recovery over by Gulf against Black Warrior under the 56th Admiralty Rule. Under this Court's holding in *Ryan Stevedoring Co., Inc. vs. Pan Atlantic Steamship Corporation* decided January 9th, 1956, 350 U.S. 124, Gulf should be allowed indemnity over against Black Warrior under the 56th Admiralty Rule for breach of contract pursuant to the terms of the private contract of carriage, Appendix B hereto, *infra*, p. 43, which recovery over the Court of Appeal denied.

(2) The Court of Appeal has rejected the facts

found by the District Court and has decided contrary to Judge Wright's findings of fact that (a) Lamy was not guilty of negligence, and (b) Morrissette was not guilty of negligence, and declared both free from negligence without manifest error, contrary to the rule announced in the decision of this Court in *McAllister vs. U. S.*, 348 U.S. 19, 75 Sup. Ct. 6 (1948).

(3) The defense of the Fire Statute was improperly considered, being invoked for the first time on appeal.

(4) In view of the negligence of Lamy, the Company's top agent on the scene, the Fire Statute should not apply under the decisions of this Court in *The Gallileo, Earl Stoddard vs. Ellerman's Wilson Line*, 287 U.S. 420, 53 Sup. Ct. 200 (1932).

IV.

STATUTES INVOLVED

This case involves Admiralty Rule 56, the U. S. Fire Statute, 46 U.S. Code 182, printed in Appendix C, *infra* p. 49, and the Louisiana Civil Code Article 2315 concerning the right of survivorship in death action, printed in Appendix D, *infra* p. 50.

V.

SUMMARY STATEMENT

A great fire and resulting explosions on a gasoline barge at the Gretna Terminal of Gulf Refining Company on the West Bank of the Mississippi River opposite New Orleans in the early morning of May 11th, 1952, is the basis of this litigation. Claims for property damage, personal injury damages and damages for wrongful death were filed in the United States District Court for the

Eastern District of Louisiana, sitting in Admiralty under Article 3, Sec. 2 of the Constitution of the United States, which proceedings are listed in Appendix E, *infra* p. 52.

Pursuant to a written contract of private carriage, Appendix B, *infra* p. 43, Black Warrior Towing Company (hereinafter referred to simply as Black Warrior) was discharging and delivering to the Gulf Terminal three barges loaded with gasoline belonging to Gulf, which Black Warrior had towed from Texas City, Texas, with its diesel tug M/V REBEL WARRIOR. Black Warrior owned and operated the tug and all three barges. Gulf's terminal had a dock facility for loading and unloading liquid fuel, constructed of four steel barges, end on end, parallel to the shore, over which ran pipe lines to connect its shore tanks to water craft, as is shown in detail on Exhibit Gulf 1-a, Appendix F, *infra* p. 59.

As the tow approached the terminal, all barges were fully loaded and sat low in the water with a tilt to stern. The tug moored the barges 107 and 109 upstream and the 112 at the downstream end of the dock, R. 201, 251. The 112 started pumping gasoline at 5:30 A.M. with its own pumps. Then, after servicing air to the 107, the tug was moored to the starboard quarter of the 109 near the stern of the barge, and remained in that position until the fire.

Shortly before 6:15 A.M. the tug's diesel cook stove was burning in the galley on her port side, on which breakfast had been prepared, and which stove had been burning for an indefinite time, perhaps several days. Several feet away on the starboard outboard end of the 109 was located the all important open end of her discharge line. The watertight galley door which opened

outwardly on the port side of the tug was open, but the screen door which opened inwardly, was closed. At about 6:15 A.M. a large blue flash occurred on the stern end of the 109, followed immediately by fire and explosions which damaged the barges, their gasoline cargo, the tug, and Gulf's terminal. Three men lost their lives.

Black Warrior and its underwriters sued Gulf and Gulf sued Black Warrior for property damage. Three suits were filed for damages for deaths, one of which was settled before trial. Three suits were brought for personal injuries.

On the trial before Honorable J. Skelly Wright, Gulf contended that two acts of gross negligence by Black Warrior and its representatives and employees were the proximate cause of the accident, namely (a) allowing the lighted galley range to burn near a discharging gasoline barge, and (b) allowing the open end of the discharge line to remain uncapped. Black Warrior on the other hand contended that the sole cause of the fire was the negligence of a Gulf employee, Villa LeBlanc, in opening a shore valve, thus permitting gasoline to run down through the pipeline system on the 107 and 109, and then out through the open end of the discharge line. The District Court's decree on the question of liability, R. 841, found both Black Warrior and Gulf at fault and rendered a judgment of divided damages on the property damage claim. Judge Wright found contributory negligence by the surviving personal injury claimants, Curry and Thomas who sued Gulf and the damages were accordingly apportioned, R. 855, 856, but denied recovery over by Gulf against Black Warrior. He denied the two claims for wrongful death, because of contributory negligence being a complete defense under the State law, R. 854.

The matter was appealed to the Court of Appeal for the Fifth Circuit, which affirmed Judge Wright on the question of negligence as to the personal injury claims of Curry and Thomas, and also as to the property damage claims except as to cargo, but reversed and remanded the death claims on the ground that the two decedents, Lamy and Morrissette, were not guilty of negligence. As a corrollary, the Court also remanded as to Gulf's cargo damage claim, on the defense of the U.S. Fire Statute, 46 U.S. Code 182, which defense was raised for the first time on appeal.

There was one record on appeal containing the transcript of testimony, and exhibits. There were separate records of the pleadings.

VI.

REASONS FOR GRANTING THE WRIT

(1)

The Court of Appeal erred in denying recovery over in contract, and departed from this Court's decision in the Ryan Stevedoring Company Case.

Under the contract of carriage between Gulf and Black Warrior, Appendix B hereto, *infra* p. 43, Gulf claims indemnity because Back Warrior has breached its duty and its implied obligations to Gulf to furnish a seaworthy vessel and a competent captain and crew to carry on the unloading operations under said contract in a competent, prudent and safe manner under *Ryan Stevedoring Co., Inc. vs. Pan-Atlantic S.S. Corp.*, 350 U.S. 124. Competence and safety were inescapable elements of the service undertaken under that decision by this Court.

The obligation of Black Warrior was not a quasi-

contractual obligation implied in law or arising out of a non-contractual or mere delictual relationship; the obligation was the essence of the said contract of carriage. It was Black Warrior's warranty of workmanlike service.

The Court of Appeal found that Black Warrior breached its duties to Gulf and held that it would not overrule the finding of the lower Court that Black Warrior was negligent in not blanking off the outboard discharge line of the 109, and by permitting the galley fire to burn in close proximity to the discharge operation, Appendix A, *infra* p. 23. The Court of Appeal also clearly found that the 109 was unseaworthy, which in itself constitutes failure on the part of Black Warrior to carry out its contract reasonably, prudently and safely, with proper equipment and proper manpower.

Yet, the Court of Appeal denied recovery by way of indemnity on the grounds that Gulf has no right to *contribution* from Black Warrior, its *joint tort feasor*, in a non-collision maritime injury case, under the doctrine of *Halcyon Lines vs. Haenn Ship Corp.* 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952).

We respectfully submit that the Court of Appeal is in error, *First*, in interpreting the contention of Gulf as being a plea for contribution and not for indemnity; *Second* in applying the *Halcyon Lines* decision, *supra;* and *Third*, in not applying the doctrine of *Ryan Stevedoring Co., Inc. vs. Pan-Atlantic Steamship Corporation*, 350 U.S. 124.

As stated hereinabove, Gulf's prayer for indemnity under admiralty Rule No. 56 is predicated upon the existence of the contract between Gulf and Black Warrior, and is not based on tort.

As the result of the failure on the part of Black Warrior to carry out its contract and to fulfill the implied obligations and duties growing out of said contract with competence and safety, Gulf, under the opinion of the Court of Appeal, shall sustain serious losses as follows:

(1) Hartford Accident and Indemnity Company seeks recovery of substantial amounts paid and to be paid to Lamy's representatives under the Longshoremen and Harbor Workers' Act. Hartford, as the insurer of Black Warrior, stands in the shoes of Black Warrior in this transaction.

Under that Court's judgment Black Warrior is being permitted to recover through its insurer in a transaction in which Black Warrior was grossly negligent and in which Black Warrior failed to carry out its contract properly.

(2) Black Warrior, as the record shows, has settled with Morrissette's representatives and with Thomas and Curry under the "Jones Act," with the agreed stipulation that Black Warrior shall recover its payments to these respective parties from whatever monies are recovered herein by said individual parties.

Under the judgment of that Court, Black Warrior is being permitted to be made whole in this transaction, notwithstanding its gross negligence and the failure to carry out its contract properly.

Gulf contends that the law of the Supreme Court as set out in the case of *Ryan Stevedoring Company, Inc. vs. Pan-Atlantic Steamship Corporation, supra,* decided on January 9, 1956, (and not available in text to the Fifth

Circuit at the time the instant case was argued on the original hearing) is controlling and entitles Gulf to indemnity over against Black Warrior under the implied obligations growing out of the private contract of carriage for all amounts which it may be called upon to pay in these various actions brought by Black Warrior, Hartford, Thomas, Curry and Morrissette's representatives.

In the *Ryan* case this Court granted indemnity to Pan-Atlantic, operator of a steamship, under the following circumstances:

Ryan loaded the S S CANTON VICTORY, as stevedore. Thereafter, the ship completed a voyage from the point of embarkation, in South Carolina, to Brooklyn, New York. While unloading the vessel, Palazzolo, an employee of Ryan, was injured. He elected to sue Pan-Atlantic and recovered under the doctrine of unseaworthiness of the vessel. Pan-Atlantic sought indemnity over against Ryan. Ryan claimed that the Longshoremen's Act precluded a claim against it, for said Act was its sole responsibility in the premises. The lower Court denied indemnity. The Court of Appeals reversed the lower court and permitted indemnity, under a theory of primary, active negligence as contrasted to secondary or passive negligence.

This Court permitted indemnity on an entirely different theory, which will be set out hereinafter, and decided that the Longshoremen and Harbor Workers' Compensation Act did not preclude a shipowner from asserting such a liability, and, secondly, that liability does exist where a contractor, without entering into an expressed agreement of indemnity, contracts to perform certain operations and the injured party's injuries are caused by

the contractor's unsafe acts.

The Supreme Court declared:

> "In the face of a formal bond of indemnity this statute (U.S. Longshoremen's Act) clearly does not cut off a shipowner's right to recover from a bonding company the reimbursement that the indemnitor, for good consideration, has expressly contracted to pay. Such a liability springs from an independent contractual right. It is not an action by or on behalf of the employee and it is not one to recover damages 'on account of' an employee's 'injury or death.' It is a simple action to recover, under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on its ship.
>
> "A like result occurs where a shipowner sues, for breach of warranty, a supplier of defective ship's gear that has caused injury or death to a longshoreman using it in the course of his employment on shipboard. And a like liability for breach of contract accrues to a shipowner against a stevedoring contractor in any instance when the latter's improper stowage of cargo causes an injury on shipboard to some one other than one of its employees. The coincidence that the loading contractor here happens to be the employer of the injured longshoreman makes no difference in principle. While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly. See *American Stevedores vs. Porello*, 330 U.S. 446; *Crawford vs. Pope & Talbot*, 206 F. 2d 784, 792-793; *Brown vs. American-Hawaiian S.S. Co.*, 211 F.

2d 16; *Rich vs. United States*, 177 F. 2d 688; *United States vs. Arrow Stevedoring Co.*, 175 F. 2d 329.

"The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for indemnity on that basis is not barred by the Compensation Act.

* * * * *

"The answer to this is found in the precise ground of the shipowner's action. By hypothesis, its action is not based on a bond of indemnity such as it may purchase by way of insurance, or may require of its stevedoring contractor, and which expressly undertakes to save the shipowner harmless. If the shipowner did hold such an express agreement of indemnity here, it is not disputed that it would be enforceable against the indemnitor. *On the other hand, the shipowner's action for indemnity here is not based merely on the ground that the shipowner and contractor each is responsible in some related degree for the tortious stowage of cargo that caused injury to Palazzolo. Such an action, brought without reliance upon contractual undertakings, would present the bald question whether the stevedoring contractor or the shipowner, because of their respective responsibilities for the unsafe stowage, should bear the ultimate burden of the injured longshoreman's judgment. That question has been widely discussed elsewhere in terms of the relative responsibility of the parties for the tort, and those discussions have dealt with concepts of primary and secondary or active or passive tortious conduct. Because Respondent in the instant case relies en-*

tirely upon petitioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such right.

"The shipowner's claim here also is not a claim for contribution from a *joint tort feasor.* Consequently, the considerations which led to the decision in *Halcyon Lines vs. Haenn Ship Corp.*, 342 U.S. 282, are not applicable. See *American Mutual Liability Ins. Co. vs. Matthews*, 182 F. 2d 322.

"The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a non-contractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that is comparable to a manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service."

(Emphasis and parenthesis supplied)

In view of the foregoing decision, Gulf claims full indemnity against Black Warrior and the M.V. REBEL WARRIOR.

In the alternative, should this Court in its judgment see fit to modify the *Ryan* decision in its application to these facts by reason of any negligence on the part of Gulf, the existence of which is denied, Gulf contends and

submits that the Court should permit indemnity over on an apportionment-of-damages basis.

That is to say, we contend, as an alternative, that should this Court find Gulf to have been negligent to the extent of fifty (50%) per cent, then Gulf should be entitled to indemnity over to the extent of fifty per cent. of the loss sustained in this transaction.

It would be inequitable to permit Black Warrior to be fully released from responsibility to the tort claimants such as Thomas, Curry, Morrissette and Hartford and, further, to recover by way of subrogation or otherwise against Gulf, when the negligence of Black Warrior was the predominating cause of the losses sustained as a result of this accident. In no event should Gulf be called upon to bear the full and entire economic burden of these claims.

(2-a)

The District Court's Finding that Lamy was negligent is final, and it was error for the Court of Appeals to reverse, there being no manifest error.

The District Court's opinion was amply supported by the evidence. As such there was no manifest error and the Court of Appeal should not have found otherwise. The Court of Appeal acted contrarily to this Court's decision in *McAllister vs. U. S.*, 348 U.S. 18 (1948). In that case, this Court declared:

> "The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly er-

roneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

* * * * *

"On evidence showing these facts, including the opinion of the experts, we think there was substantial evidence from which the District Court could and did find that respondent was negligent in permitting these Chinese, from the infested area of Shanghai, to have the run of the ship and use of its facilities, and in furnishing the crude and exposed latrine provided on the deck of the ship, by reason whereof the petitioner contracted polio.

Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved, supported as they were by the best judgment medical experts have upon the subject today, that petitioner was contaminated by the Chinese who came aboard the ship November 11, 1945, at Shanghai. Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous. *Myers vs. Reading Co*, 331 U.S. 477, 485-486; *Tennant vs. Peoria & P.U.R. Co.*, 321 U.S. 29. We think it was an allowible judgment of the District Court, and the judgment of the Court of Appeals is

Reversed."

The Court of Appeal recognized this rule in this case when it stated, "We cannot set aside (this) finding of fact unless it was clearly erroneous." 230 F. 2d 354, and at p. 351 declared "we cannot therefore, hold that such finding by the Trial Court was clearly erroneous."

Yet the Court of Appeal in the case at bar did reverse on fact without any manifest error on the part of the District Court, as to the Lamy and Morrissette claims.

The District Judge found (R. 854):

> "The evidence shows that Lamey was not a member of the crew of the REBEL WARRIOR. He was a shoreside employee of Black Warrior, who supervised the entire discharge operations for that Company. Under the circumstances, the negligence of Black Warrior, as shown above, was at least partially the negligence of Lamey, *for it was he who allowed the discharge operation to begin without blanking off the outboard end of the discharge line of the 109, and it was he who allowed the REBEL WARRIOR, with the open fire in her galley, to come alongside the 109 in the vicinity of the outboard end of the discharge line.*"
>
> (Emphasis supplied)

The Court of Appeal reversed on this point and stated:

> "The trial court found, however, that Lamey also was negligent, 'for it was he who allowed the discharge operation to begin without blanking off the outboard end of the 109'. On the other hand, as noted above, Dunaway's uncontradicted testimony was that he and Lamey checked the flanges on the 112 before beginning the discharge operation there, and were preparing to do the same on the 107 and the 109 when the explosion occurred. There was no evidence that Lamey knew of the absence of the flange, but there is evidence that he would have checked it before starting the pumps or authorizing LeBlanc to open the dock valve. The trial court thus imposed a duty on Lamey to make a complete inspection of the barges, for unseaworthiness, immediately on coming aboard to conduct discharge operations. We cannot agree that it was a breach of due care on

Lamey's part to postpone his inspection of the equipment he was to use until immediately before he was prepared to use it. He could not reasonably be required to foresee, in other words, that from the moment he came aboard the barges in the morning, a condition existed, and had existed before their arrival, which imperiled the lives of the entire crew. The fault for leaving the discharge line unflanged lay, as we have said, with the master or the pilot; and in the light of the usual warranty of a vessel's seaworthiness at the beginning of a voyage, *The Caledonia*, 157 U.S. 124, 15 S. Ct. 502, 39 L. Ed. 613, we see no reason why Lamey should have presumed the fact to be otherwise."

* * * * *

" * * * The port engineer was the shoreside employee *solely responsible* for the discharge operations, but although those operations required air from the towboat, he at no time gave any order regarding its movement or operation, and indeed, even if he had, this could not have relieved the master or the pilot from their responsibilities to the vessel. *The B.B. No. 21* (2 Cir.), 54 F. 2d 532."

(Emphasis supplied)

This Court should grant certiorari because the Court of Appeals' decision if permitted to stand would set a precedent which this Court would not permit in the *McAllister* case.

The District Court was amply buttressed by evidence. The Court of Appeal has shown no manifest error. Lamy was Black Warrior's commanding officer on the scene. The supervision of the unloading was cast squarely on his shoulders. The acts of negligence of those under him took place under his very eyes.

Under the decision of this Court in *McAllister vs. U.S.*, the Court of Appeal should be straightened out on this issue.

(2-b)

Morrissette's negligence is final as found by the District Judge.

Likewise as to Morrissette, the same rule prevails as in (2-a) above. The District Court found:

> "The evidence shows that Lamey was not a member of the crew of the REBEL WARRIOR. He was a shoreside employee of Black Warrior, *who supervised the entire discharge operations for that Company.* Under the circumstances, the negligence of Black Warrior, as shown above, was at least partially the negligence of Lamey, for it was he who allowed the discharge operation to begin without blanking off the outboard end of the discharge line of the 109 and it was he who allowed the REBEL WARRIOR, with the open fire in her galley, to come alongside the 109 in the vicinity of the outboard end of the discharge line."
> (Emphasis supplied)

The Court of Appeal declared:

> "The trial court also found Morrissette negligent in keeping, and Lamey in allowing, a fire in the galley stove while the towboat was alongside the 109. It was sworn to at the trial that it was the custom aboard the REBEL WARRIOR to keep the galley fire going 24 hours a day. Coast Guard regulations allow this, provided that 'the senior deck officer on duty' makes an inspection 'to determine whether in his judgment galley fires may be maintained with reasonable safety.' The pilot, Kirk, testified that it was customary to douse galley fires when the towboat went alongside the barges. However, he knew that breakfast

was being prepared, and that the order, if there was such, was being violated, and admitted that he made no attempt to enforce it. Moreover, the cook cannot be charged with knowledge of the absence of the flange or of the danger that would result therefrom. Kirk brought the towboat alongside the 109, with the galley door roughly opposite the open discharge line, and although he was in his quarters reading a newspaper at the time of the explosion, he was waiting to move the towboat down-river. It is clear that it was his duty to ascertain the safety of keeping a fire in the galley while the towboat was moored to the 109, and that this matter of judgment under applicable regulations could not be tacitly delegated by him to the cook. Nor can it validly be argued that during this period the senior officer's responsibilities for safe practices aboard the towboat devolved upon the port engineer, to be resumed by the pilot only when the towboat moved away from the 109 * * *."

Again the District Court's decision is based on substantial evidence and no manifest error has been shown. Again the Court of Appeal should be straightened out.

Again, to permit the Court of Appeal's opinion to stand would do violence to this Court's decision in *McAllister vs. U. S., supra,* and would establish the dangerous precedent in appellate practices of a Court of Appeal reversing a district court in the absence of a showing of manifest error by the district court, and cause great confusion in the jurisprudence.

(3)

The Fire Statute Issue, not presented in the District Court, came too late on appeal.

The Fire Statute was invoked for the first time on appeal, for the record in the District Court is silent about it.

There is no decision by this Court that such a defense must be raised in the lower court. The question is one which should be decided by this Court because of its importance in pleading matters in the Maritime Field.

However, there are many decisions of Courts of Appeal that hold that comparable defenses if not raised in the District Court cannot be raised on appeal.

The following cases by the Courts of Appeal show the policy of the courts that related matters should not be raised for the first time on appeal, namely *Seville vs. U. S.*, 163 Fed. 2d 296 (9-C, 1947) as to the issue that appellee failed in its duty to care for the injury; *Vileski vs. Pacific-Atlantic Steamship Company*, 163 Fed. 2d 553 (9-C, 1947) with regard to sufficiency of cure; *Great Lakes Towing Company vs. American Steamship Company*, 165 Fed. 2d 368 (6-C, 1948), the issue of measure of damages for loss of use of vessel; *American Dredging Company vs. U. S.*, 174 Fed. 2d 822 (1949), an attempt to assert a cross claim for indemnification under a stevedoring contract; *Ludwig vs. Accinanto, Ltd.*, 199 Fed. 2d 134 (1952) the issue that a party was liable as an insurer; and *Nicaraguan Long Leaf Pine Lumber Co. vs. Moody*, 211 Few 2d 715 (5-C, 1954), consideration of a deposition not introduced in evidence.

We believe that the above decisions support our view that where an issue depends upon the development of facts, as in this case, and was not raised in the District Court, it can not be raised for the first time on appeal, especially where there is no sound reason shown why the defense was not urged in the District Court.

The Court of Appeal is therefore at variance with the other circuits on the principle involved, and should be straightened out.

(4)

The Fire Statute does not apply in view of Lamey's negligence.

If your Honors agree that the District Court was correct in finding Lamey guilty of negligence, then the Fire Statute by its very terms should have no application. The Court of Appeal found him "the shoreside employee solely responsible for the discharge operations".

The District Court found him responsible, R. 854. The finding is based on ample evidence.

President Davis of Black Warrior testified at some length that the unloading was under Lamey's direct control, R. 72 and 75. Therefore Lamey was chargeable with the entire operation for Black Warrior.

The conclusion reached by the Court of Appeal does violence to the decision of this Court in *Earle and Stoddard vs. Ellerman's Wilson Line (The Galileo)*, 287 U.S. 420, 53 Sup. Ct. 200 (1932), because here the immediate representative of Black Warrior, a small company, was negligent, and the company was chargeable with his actions the same as if the President himself had been in charge. The Fire Statute's very terms exclude its application. In the *Galileo, supra*, it was the Chief Engineer, a member of the vessel's personnel, who was alleged to have had knowledge, and not the personal representative of the owner. This Court should adhere to the prin-

ciple in the *Galileo* and grant certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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BURKE & HOPKINS
LEON SARPY

CERTIFICATE

This certifies that copies of this Petition have been served on Counsel for Black Warrior Towing Company, Respondent, by delivery in person on June ....., 1956.

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Proctor for Petitioner.